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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 532 and 552

[GSAR Amendment 2012-01; GSAR Case 2010-G509 (Change 53)

Docket 2011-0009; Sequence 1]

RIN 3090-AJ13

**General Services Administration Acquisition Regulation;
Reinstatement of Coverage Pertaining to Final Payment under
Construction and Building Service Contracts**

AGENCIES: General Services Administration (GSA), Office of Acquisition Policy.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to restore guidance on the release of claims after completion of construction and building service contracts to ensure contractors are paid in accordance with their contract requirements and for work performed. This guidance, which prescribed the use of GSA Form 1142, Release of Claims, for releases of claims under construction and building service contracts, was inadvertently deleted as part of the Rewrite of GSAR regulations on Contract Financing. GSA contracting officers have used this form to achieve uniformity and consistency in the release of claims process.

DATES: Effective Date: [Insert date 30 days after FEDERAL REGISTER publication].

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221, or by e-mail at edward.chambers@gsa.gov. For information pertaining to status or publication schedules, contact the Regulatory Secretariat (MVCB), 1275 First Street, 7th Floor, Washington, D.C. 20417, (202) 501-4755. Please cite GSAR Amendment 2012-01, GSAR Case 2010-G509.

SUPPLEMENTARY INFORMATION:

A. Background

GSA issued a proposed rule in the Federal Register at 76 FR 13329, March 11, 2011 to restore coverage on making final payments under construction and building service contracts. A release of claims is a requirement under GSAR clause 552.232-72, Final Payment, precedent to making final payment under construction and building service contracts. GSA contracting officers have relied upon GSA Form 1142 to obtain the release of claims under these contracts. However, GSAR 532.905-71 which prescribed the use of GSA Form 1142 for releases of claims under construction and

building service contracts was inadvertently deleted as part of the Rewrite of GSAR Part 532, Contract Financing published in the Federal Register at 74 FR 54915, October 29, 2009, GSAR Case 2006-G515. GSAR 532.905-71 also provided guidance on deductions to final payments under construction and building service contracts.

The GSA Form 1142, Release of Claims, uses standard language for contractors to attest that it has no claims, or no claims except for those they may set forth where indicated on the form. The form requires a signature from the contractor and a witness. Additionally, there is a location for the firm's seal.

GSA believes that GSA Form 1142 provides great value and accountability in providing uniformity and consistency for the release of claims process. Without the GSA Form 1142, GSA contracting officers will be required to verify that contractor release of claims letter includes appropriate wording before final payment is made, resulting in their devotion of considerable additional resources to this process. Further, the coverage on deductions under GSAR 532.905-71 is useful in preventing overpayments to contractors consistent with the Office of Management and

Budget's efforts to reduce improper payments and the reissuance of OMB Circular A-123 which implements the Improper Payments Elimination and Recovery Act (IPERA, Pub. L. 111-204).

Since the referenced GSAR Rewrite of Part 532 in the Federal Register at 74 FR 54915, October 26, 2009, also deleted GSAR 532.905-70, this coverage is restored at GSAR 532.905-70 vice GSAR 532.905-71.

B. Public Comments

The public comment period closed on May 10, 2011. Three respondents submitted comments on the proposed rule. These responses included a total of 18 comments on 9 issues as stated below:

Comment: The proposed GSAR coverage addresses both construction and building service contracts, so that each contract type requires the GSA Form 1142, "Release of Claims," but that the proposed language refers only to the construction payment clause at FAR 52.232-5, and indicates that this clause also applies to building services. Revise GSAR 532.905-70(a) to read as follows: "The Government shall pay the final amount due the Contractor under this contract after the documentation in the payment clauses of the contract is submitted. This would include the final

release required for construction at FAR clause 52.232-5, and for building services at GSAR clause 552.232-72."

Move the existing coverage on GSAR clause 552.232-72 from its current location at GSAR 532.904(b) to 532.905, so that it is in the same place as the proposed language.

Response: The comment regarding the revision to GSAR 532.905-70(a) has been adopted and this paragraph now largely reflects the suggested language. However, it was decided not to relocate the prescriptive language for GSAR clause 552.232-72 from its current location at GSAR 532.904(b) to 532.905.

GSAR 532.904 concerns determining payment due dates and GSAR clause 552.232-72 informs vendors that their final payments may only occur after their submission of a release of claims. On the other hand, GSAR 532.905 concerns the broad areas of payment documentation and process. Thus, GSAR clause 552.232-72 better aligns with GSAR 532.904 rather than GSAR 532.905.

Comment: The term deductions should be clarified to distinguish it from funds that are just withheld temporarily, such as when a Department of Labor investigation does not find any labor violations.

GSA should remind contracting officers that a unilateral deobligation modification at contract close-out can only be

accomplished using the authority of one of the FAR clauses in accordance with FAR 43.103(b)(3) (e.g. Liquidated Damages, SCA, and DBA).

How does GSA propose to place "withheld money" in a "deposit fund" and transfer "same" to Department of Labor (DOL) for labor violations without a modification against the contract to reduce the total value to reflect this action? The respondents goes on that likewise without a formal modification to assess liquidated damages, authorized under FAR 52.211 clauses, that have accrued against the contract, in the same way that unilateral change orders are, then the Government risks having an issue at contract close-out with funds remaining. Without a formal modification, the respondent contends that GSA will create problems at contract close-out when the "withheld funds" remain open on the contract.

Response: A sample list of deductions is provided at GSAR 532.905-70; therefore, there is no need to provide further definitions. The FAR Subpart 43.1 provides instructions on the use of bilateral and unilateral modifications. GSA's contracting officers know the limits of unilateral modifications, and consequently, specific guidance is not needed in the GSAR on this matter. Because withholding funds is an established practice under

Government contracts in accordance with FAR section 32.111, GSA does not see the need to create the "deposit fund" suggested by this commenter. Regarding the possibility of modifications not being executed and the risk of relying on the release of claims to make such necessary adjustments, modifications are typically executed in advance of contract closeout to make necessary adjustments.

Comment: GSA's Form 1142 Release of Claims form contains no OMB control number indicating it has been approved for the collection of information.

Response: GSA Form 1142 has been assigned OMB Control Number of 3090-0080 with an expiration date of 3/31/2012. With this GSAR correction, the form is available for use.

Comment: One respondent states that there is no indication that a Regulatory Flexibility Analysis was ever performed to reflect the burden or impact on contractors, including small businesses, especially the requirements for a "witness" and a "seal." This respondent states further that the requirement for a hardcopy notary/witness and seal seems outdated, unreasonable, and that GSA is being overly restrictive by requiring a "seal."

Another respondent affirms that the proposed requirement to have the form witnessed and include the firm's seal provides a burden to the contractor. This burden could be

greatest on small businesses that do not have a company seal on hand and are therefore forced to seek out a notary. The contractor's signature on the GSA Form 1142 is sufficient to complete the release process. The requirement on the GSA Form 1142 to have a witness and include the firm's seal should be removed when the form is reinstated.

Response: The costs associated with executing the notary/witness and seal are considered miniscule, and consequently represent, at most, a negligible burden on both large and small businesses. Further, notice is taken that many banking institutions offer notarization as a complimentary service or for a minor fee. It is customary for firms to have a company seal to use when conducting government or commercial business. However, the cost of attaining a company seal is considered insignificant. The notarization of the document serves to attest to the importance of this document.

Comment: The GSA Form 1142 fails to advise contractors, especially small businesses that, by signing the form, they are likely waiving their rights to submit claims permitted under the Disputes Act. It is improper for the Government to require an unconditional release from contractors as a prerequisite for final payment. The form should be revised

to recognize a contractor's right to submit claims "within 6 years following the release date or notice of final payment date, whichever is earlier" as set forth in FAR clause 52.216-7(h)(2)(ii), and FAR 33.206, when a claim was unknown at the time of executing the form. Similarly the form should allow contractors the ability to cite "estimated amounts when the exact amounts are not known" as permitted under the same FAR clause.

Response: Instructing contractors on the legal implications under the Disputes Act of their executing the form, or of their right under FAR 33.206 to submit claims within 6 years following the release date or notice of final payment date, whichever is earlier, goes beyond the purpose of the form. Finally, it is necessary to inform contractors to cite estimated amounts when exact amounts are not known. The use of such qualifying terms such as "estimated" amounts is implicit in the existing language.

Comment: Since releases of claims are cited in FAR 52.232-7(g) for Time & Material/Labor Hour contracts, and in parentheses as an example("e.g.") under 52.232-26 and -27 for architect-engineer (A-E) and construction contracts, respectively, it would seem more appropriate for the FAR Council to develop a Standard Form (SF) to be used by all agencies in accordance with FAR 1.304(c) since it is

not just pertinent to GSA and since releases apply to final payments', it is highly recommended that GSA and/or the FAR Council consider allowing contractors to submit the release jointly along with the electronic submission of a final invoice request.

Response: The development of a Governmentwide standard form for the release of claims is beyond the scope of this case.

Comment: One respondent states that GSA's allowance for contracting officers (COs) to make "repeated attempts" to obtain a release of claims from contractors under GSAM 532.904 could be construed as coercion penalizing contractors by withholding funds "without cause." The GSAM should justify the reasonableness of withholding any funds from contractors beyond the 30 days authorized by FAR for final payments. The respondent further states that any "unreasonable delay" in payment could, by law, convert invoices into a claim. The respondent recommends that GSA consider establishing a limit to the number of "repeated attempts" and a maximum number of days for GSA COs to withhold final payment from the date when the invoice is officially received.

Another respondent recommends that the proposed GSAM 532.905-70(c) should provide further guidance on the

documentation the CO should provide to legal counsel to obtain approval on a release where the CO was unable to obtain the release after 60 days from the initial attempt. The process should be standardized within GSAM so that legal counsel in one GSA region does not require a second or third attempt before approval is granted, while another region grants approval after the first 60 day attempt.

Response: The submission of an executed GSA Form 1142 is not an unreasonable stipulation for a contractor to receive final payment. The GSA Form 1142 is a necessary tool to allow the Government to obtain a final settlement of costs. GSA does not believe that a requirement for a justification for payments in excess of 30 days would be useful, as this will further delay final payment. Additionally, it would not be prudent to establish a standard number of attempts to secure an executed GSA Form 1142 before obtaining approval of assigned legal counsel to make final payment, but rather the number of attempts should be a function of the particular circumstances involved in obtaining the release. The process of submitting documentation to assigned legal, to support making final payment where the CO was unable to obtain the release of claims after 60 days from the initial attempt,

should not be standardized, as the documentation requirements may vary by circumstances.

Comment: GSA Form 1142 may serve to shift the responsibility for contracting officers to ensure that the Government does not overpay contractors and "proper" payments to contractors are made, only upon ensuring services have been received and accepted, to contractors. In what way would a contractor's Release of Claims ensure that a contracting officer does not overpay a contractor or authorize/approve "improper payments" to a contractor? How does GSA support its claim that clause 532.905-71 was useful in preventing overpayments to contractors, is it supported by analysis or statistical documentation?

Response: The GSA Form 1142 does not shift to contractors the responsibility for contracting officers to ensure that the Government does not overpay contractors, and "proper" payments to contractors are made only upon ensuring services have been received and accepted. Rather, GSA views the release as another tool for the contracting officer to ensure that correct payments have been made. To the extent that GSA Form 1142 requires contractors to identify outstanding claims, it serves to prevent under payments. The information collected was determined necessary to ensure the Government issues correct payments

to contractors and the form facilitates that activity; thereby, serving as GSA's rationale for determining the usefulness of GSAR clause 532.905-71 in preventing overpayments to contractors.

Comment: Has GSA even considered the prospect of obtaining a release electronically via email in lieu of a hardcopy/form?

Response: This rule was established to reinstate the use of GSA Form 1142, Release of Claims as a tool for contracting officers to obtain the release of claims under construction and building service contracts. At this time, consideration has not been given to a release electronically via email in lieu of a hardcopy/form.

C. Executive Orders 12866 and 13563

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804. In accordance with Executive Order 13563, Improving Regulation and Regulatory Review, dated January 18, 2011, GSA has determined that this rule is not excessively burdensome to the public, the GSA Form 1142, as prescribed by the rule, is useful to the Government to make certain that the contractor receives proper payment for

work performed and aids contractors in presenting their release of claims to the Government.

D. Regulatory Flexibility Act

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule requires the contractor to sign a release of claims form and is considered administrative in nature. Submission of this information should provide a consistent format that the contractor can use to report their claims information to the GSA contracting officer.

E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the GSAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 3090-0080. This approval was not rescinded when GSAR 532.905-71, which prescribed the use of GSA Form 1142 for releases of claims under construction and building service contracts, was

inadvertently deleted as part of the Rewrite of GSAR Part 532, Contract Financing, published in the Federal Register at 74 FR 54915, October 29, 2009, GSAR Case 2006-G515.

List of Subjects in 48 CFR Parts 532 and 552

Government procurement.

Dated: February 3, 2012

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Therefore, GSA amends 48 CFR parts 532 and 552 as set forth below:

1. The authority citation for 48 CFR parts 532 and 552 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c).

PART 532—CONTRACT FINANCING

2. Add section 532.905-70 to read as follows:

532.905-70 Final payment—construction and building service contracts.

The following procedures apply to construction and building service contracts:

(a) The Government shall pay the final amount due the Contractor under this contract after the documentation in the payment clauses of the contract is submitted. This includes the final release prescribed for construction at FAR 52.232-5, and for building services at GSAR 552.232-72.

(b) Contracting officers may not process the final payment on construction or building service contracts until the contractor submits a properly executed GSA Form 1142, Release of Claims, except as provided in paragraph (c) of this section.

(c) In cases where, after 60 days from the initial attempt, the contracting officer is unable to obtain a release of claims from the contractor, the final payment

may be processed with the approval of assigned legal counsel.

(d) The amount of final payment must include, as appropriate, deductions to cover any of the following:

- (1) Liquidated damages for late completion.
- (2) Liquidated damages for labor violations.
- (3) Amount withheld for improper payment of labor wages.

- (4) The amount of unilateral change orders covering defects and omissions.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Revise section 552.232-72 to read as follows:

552.232-72 Final Payment Under Building Services Contracts.

As prescribed in 532.904(c), insert the following clause:

FINAL PAYMENT UNDER BUILDING SERVICES CONTRACTS (MAR 2012)

Before final payment is made, the Contractor shall complete and furnish the Contracting Officer with GSA Form 1142, Release of Claims, releasing all claims against the Government relating to this contract, other than claims in stated amounts that are specifically excepted by the Contractor from the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 3727, 41 U.S.C. 15), a release may also be required of the assignee.

[BILLING CODE 6820-61]

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